No. 13800.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT DONALD ROWLAND,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

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REPLY BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on October 15, 1952, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On October 27, 1952, the appellant was arraigned, entered a plea of Not Guilty, and the case was set for trial on November 24, 1952. [R. p. 4.]

On December 23, 1952, trial was begun in the United States District Court for the Southern District of California, by the Honorable William C. Mathes, without a jury, and on February 9, 1953, the appellant was found guilty as charged in the Indictment. [R. p. 78.]

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[1]"R." refers to Transcript of Record.

On March 2, 1953, appellant was sentenced to imprisonment for a period of four years and judgment was so entered. [R. p. 82.] Appellant appeals from this judgment.

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231 of Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.
STATUTES INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall,

upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . ."

III.
STATEMENT OF THE CASE.

The Indictment returned October 15, 1952, charges that the defendant was duly registered with Local Draft Board No. 113, was thereafter classified I-A-O, notified to report for induction into the armed forces on July 28, 1952, and that defendant thereafter knowingly failed and refused to be inducted into the armed forces.

On October 27, 1952, appellant appeared for arraignment and plea, represented by E. H. Hiber, Esq., before the Honorable William C. Mathes, United States District Judge, and entered a plea of Not Guilty to the offense charged in the Indictment.

On December 23, 1952, the case was called for trial before the Honorable William C. Mathes, United States District Judge, without a jury, and on February 9, 1953, the appellant was found guilty as charged in the Indictment. [R. p. 78.]

On March 2, 1953, appellant was sentenced to imprisonment for a period of four years. [R. pp. 11-13.]

Appellant assigns as error the judgment of conviction on the following grounds:

A—The District Court erred in not concluding that the I-A-O classification and the denial of the full conscientious objector status were arbitrary, capricious and without basis in fact. (App. Spec. of Error 1—App. Br. p. 6.)[2]

B—The District Court erred in not holding that the motion for judgment of acquittal should have been granted. (App. Spec. of Error 2—App. Br. p. 6.)

C—The District Court erred in not holding that the indictment was fatally defective. (App. Spec. of Error 3—App. Br. p. 6.)

IV.
STATEMENT OF THE FACTS.

On November 4, 1949, Robert Donald Rowland registered under the Selective Service System with Local Board No. 113, Pasadena, California. He was eighteen years of age at the time, having been born on October 26, 1931. He gave his occupation as "Student."

On November 1, 1950, Robert Donald Rowland filed with Local Board No. 113, SSS Form 100, Classification Questionnaire, and by signing Series XVI of that questionnaire, notified the Local Board that he claimed exemption from military service by reason of his conscientious objection to participation in war. He also requested further information and forms.

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Errors"; "App. Br." refers to "Appellant's Brief."

SSS Form 150, Special Form for Conscientious Objector was furnished Rowland and he completed this form and filed it with Local Board No. 113 on November 6, 1950. Rowland claimed to be conscientiously opposed to participation in war in any form and also to participation in noncombatant training or service in the armed forces. This claim was made by reason of religious training and belief.

On November 15, 1950, Robert Donald Rowland was classified I-A-O by Local Board No. 113.

On November 21, 1950, Rowland was mailed SSS Form 110, Notice of Classification, notfiying him of the action of the Local Board.

On March 8, 1951, Rowland was mailed SSS Form 223, Order to Report for Armed Forces Physical Examination.

On April 2, 1951, Rowland was found to be acceptable for induction into the armed forces.

On July 16, 1952, SSS Form 252, Order to Report for Induction, was mailed to Rowland, ordering him to report for induction into the armed forces of the United States on July 28, 1952, at Los Angeles, California.

On July 28, 1952, Rowland reported for induction as ordered, but refused to submit to induction into the armed forces of the United States.

V.
ARGUMENT.

A. The Classification of the Appellant by the Local Board in Class I-A-O Was a Valid Classification.

The classification of registrants by Local Boards is provided by 50 U. S. C. A., App., Section 460, which provides in pertinent part:

> ". . .
>
> (b) The President is authorized—
>
> (3) To create and establish . . . local boards . . . Such local boards, . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine, . . . all questions or claims, with respect to inclusion or exemption or deferment from, training and service under this title (said sections), of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final, except where an appeal is authorized and is taken in accordance with such rule and regulations as the President may prescribe . . ."

The limitations placed upon a trial court in the review of the classification given a Selective Service registrant were defined in the case of *Cox v. United States,* 332 U. S. 442. The Court in the *Cox* case, *supra,* says at page 448:

> "The scope of review to which petitioners are entitled, however, is limited; as we said in Estep v. United States, 327 U. S. 114, 122-3: 'The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means

that the *courts are not to weigh the evidence* to determine whether the classification made by the local boards was justified. *The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous.* The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.' " (Emphasis added.)

Appellant contends that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections or veracity, and that therefore, the action of the Board in classifying him in Class I-A-O was arbitrary, capricious and without basis in fact. A reading of the appellant's Selective Service file [Government's Exhibit 2], would indicate the contrary.

Selective Service Regulations, Section 1622.6 (32 C. F. R. 1622.6) provided:

"1622.6 Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only.—

(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces.

(b) Section 6(j) of Title I of the Selective Service Act of 1948, provides in part as follows: 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

Selective Service Regulations, Section 1622.20 (32 C. F. R. 1622.20) provided:

> "1622.20 Class IV-E: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety or Interest—
>
> (a) In Class IV-E shall be placed every registrant who would have been classified in Class 1-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces.
>
> (b) Section 6(j) of Title I of the Selective Service Act of 1948 provides in part as follows: 'Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.' "

These sections of the Selective Service Regulations define in broad terms the qualifications necessary for classification as a conscientious objector in classifications I-A-O and IV-E. The application of these descriptions to particular registrants is a duty imposed upon the Local Boards. The Local Board was left to determine how and when a registrant claiming exemption from military service by reason of conscientious objection was to be qualified. The exercise of that discretion, even though it may

have been erroneous, is final, in the absence of arbitrary or capricious conduct on the part of the Local Board so classifying a registrant.

Cox v. United States, supra.

To aid the Local Board in its determination of the conscientious objector claims of registrants, the Selective Service System uses SSS Form 150, Special Form for Conscientious Objector. The questions and answers given thereto by a registrant are the basis of a classification by a Local Board within the broad terms of Selective Service Regulations, Sections 1622.6 and 1622.20. The burden is upon the registrant to maintain and prove his claim within these categories. *Davis v. United States,* 203 F. 2d 853. This burden was not met by the appellant in the present case as evidenced by the classification given him by the Local Board.

Assuming the classification given this appellant were erroneous, this Court in the case of *Dickinson v. United States,* 203 F. 2d 336, said at page 345:

> "Even if we were of the opinion that the finding of the local board was clearly erroneous, and that it should have classified appellant as a minister of religion, we cannot on that basis alone hold the action of the draft board to be illegal, and the same limitations apply to the district court . . . Surely a part of the local board's duty, and a *part of its jurisdiction, involved using its common sense in deciding whether such a claim as this was worthy of belief.*" (Emphasis added.)

A reading of the record in the instant case presents no circumstances which discloses any bias, prejudice or unreasonable conduct on the part of the Local Board in the classification of the appellant. The trial court, therefore, properly denied appellant's motion for judgment of acquittal.

B. Appellant Was Convicted Under an Indictment Properly Reciting an Offense Against the United States.

The certainty required in an indictment is only such as will fairly inform the defendant of the crime intended to be alleged, so as to enable him to prepare for his defense and so as to preclude a second prosecution for the same offense.

Boyce Motor Lines v. United States, 342 U. S. 846;

Ross v. United States, 180 F. 2d 160.

Error in the citation of a statute is not fatal so long as an offense against the United States is charged.

Williams v. United States, 168 U. S. 382;

United States v. Hutcheson, 312 U. S. 219.

The test of the sufficiency of an indictment is whether the indictment contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet.

Hagner v. United States, 285 U. S. 427.

A one-count indictment was returned against the appellant by the Federal Grand Jury on October 15, 1952. It provides:

"In the United States District Court, in and for the Southern District of California, Central Division.

September, 1952, Grand Jury.

United States of America, Plaintiff, v. Robert Donald Rowland, Defendant. No. 22530-CD.

INDICTMENT.

[U. S. C., Title 50, App., Sec. 462—Selective Service Act, 1948]

The grand jury charges:

Defendant ROBERT DONALD ROWLAND, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 113, said board being then and there duly created and acting, under the Selective Service System established by said Act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 28, 1952, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated there-

under in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

A True Bill.

Walter S. Binns,
United States Attorney.

ADM:AH

.....
Foreman."

Appellant contends that this indictment as returned by the Grand Jury fails to charge an offense against the United States. He contends that he was indicted for violation of the Selective Service Act of 1948 whereas the offense, if any, was a violation of the Universal Military Training and Service Act.

The Selective Service Act of 1948 was enacted on June 24, 1948, to provide an adequate armed strength to insure the security of the United States.

In order to provide for the increasing needs of the military establishment, the Congress enacted on June 19, 1951, the Universal Military Training and Service Act, amending the Selective Service Act of 1948. Among its provisions the 1951 amendments, Section 1(a), changed the title of the Act from "Selective Service Act of 1948" to "Universal Military Training and Service Act." Basically, however, the text of the Selective Service Act of 1948 was left unchanged.

The defect claimed to exist in the Indictment in the present case is that it "is based and is dependent on the 'Selective Service Act of 1948.'" A reading of the Indictment in its most essential parts and without reference

to any statute would indicate otherwise. The Indictment would then provide in its pertinent part:

> ". . . the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 28, 1952 . . .; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him . . . in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do."

The quoted portion of the Indictment provides all of the elements required to establish an offense against the United States, as provided in Title 50, App., United States Code, Section 462. These elements are shown to exist without reference to any statute in the Indictment. It is submitted that the appellant was fairly informed of the crime intended to be alleged in the Indictment; that the Indictment was sufficiently clear so as to enable the appellant to prepare his defense; and that it precluded a second prosecution for the same offense, within the meaning of the *Boyce* case, *supra.*

The appellant further contends that reference to the applicable statute is essential to allege the crime which the Indictment attempts to allege, for otherwise the Indictment would be lacking in a necessary allegation of fact. This is not true test of the sufficiency of the Indictment in the present case. The case of *Hagner v. United States,* 285 U. S. 427 sets forth the following text:

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite

> and certain, but whether it contains the elements of the offense intended to be charged 'and sufficiently apprises the defendant of what he must be prepared to meet . . .'"

The Federal Rules of Criminal Procedure, Rule 7, provides in part:

> "(c) . . . The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. *Error in the citation or its omission shall not be ground for dismissal* of the indictment or information . . . if the error or omission did not mislead the defendant to his prejudice." (Emphasis added.)

Assuming that there was error in the citation of the statute in the present case, the Government submits that (1) the essential elements of an offense against the United States are shown in the indictment, and (2) the appellant was not misled to his prejudice by the allegations of the indictment. The trial court, therefore, properly denied the motion to dismiss.

C. The Appellant was Classified at a Legal Meeting of the Board.

Selection Service Regulations, Section 1623.4, provides in its pertinent part:

> "1623.4. Action to be Taken When Classification Determined—
>
> (d) When the local board classifies or changes the classification of a registrant, it shall record such classification on the Classification Questionnaire (SSS Form No. 100), the Classification Record (SSS

Form No. 102), and in the space provided therefor on the face of the Cover Sheet (SSS Form No. 101)."

Selective Service Regulations, Section 1604.56, provides in its pertinent part:

"1604.56. Organization and Meetings.—. . . A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. . . ."

Neither of the two regulations set forth above requires the signature of the Board Members present and voting on a classification to be placed on any of the records kept by the Local Board. The entries referred to by appellant in his Argument [R. p. 40] are merely the notation of classification required by Section 1623.4 of the Selective Service Regulations. There is no requirement that a member of the Local Board make this notation. The initialing of that entry by one member of the Board neither vitiates the entry itself, nor does it show the composition of the Board at the time of classification.

Further, the law presumes the Local Board has done its duty. *Koch v. United States,* 150 F. 2d 762. This presumption is not overcome by the mere initialing of an entry in the Minutes of Actions by Local Boards and Appeal Board. There was no evidence introduced by appellant that he was classified at an illegal meeting of the Local Board. His classification was valid and the trial court did not err in denying the motion for judgment of acquittal upon that ground.

D. There Was No Denial of Due Process in the Classification of the Appellant.

Appellant contends he was frustrated in his attempt to appeal his clasisfication because a clerk of the Local Board told him he had already been classified I-A-O and that the Board would not change its decision. Appellant cites several cases in which registrants were frustrated by the Local Board in some function and were thereby denied substantial rights. The present case does not parallel any of these. In the present case, the appellant received and read SSS Form 110, Notice of Classification [R. pp. 62-65]. He was then apprised of his "rights" and the procedure for obtaining them. It cannot be said from the evidence elicited at the trial that the Local Board misled the appellant either intentionally or unintentionally in the prosecution of those "rights."

Selective Service Regulations, Section 1624.1, provides in its pertinent part:

> "1624.1. Opportunity to Appear in Person—(a) Every registrant, after his classification is determined by the local board, . . . shall have an opportunity to appear in person before the . . . local board . . . if he files *a written request* therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him . . ." (Emphasis added.)

and Selective Service Regulation, Section 1626.11, provides in its pertinent part:

> "1626.11. How Appeal to Appeal Board Is Taken. —(a) Any person . . . may appeal . . . by filing with the local board *a written notice of appeal.*" (Emphasis added.)

The requirements of these sections are in clear language. Registrants are apprised of these requirements by SSS Form 110, Notice of Classification [Govt. Ex. 3]. This form is mailed to the registrant, notifying him of his classification by the Local Board. The appellant in the present case received such a notice. He read it. He should not now be heard to complain that he did not understand the clear and concise language of that notice. No hearing is provided by the Regulations except upon protest and *written* request. This the appellant did not do. The trial court, therefore, properly found that there was no denial of due process in the action of the clerk of the Local Board.

Assuming that the appellant's appearance could be deemed a request for a personal appearance and appeal, there is no evidence in the Record which would indicate that such request was made within the prescribed time. The only evidence on this matter was elicited from redirect examination of the appellant by his counsel and is as follows:

> "Q. Do you recall about when you went down to the local board and had this conversation with the clerk? A. It was within a few days.
>
> Q. That is all—a few days after you received that notice of clasisfication? A. Yes, sir.
>
> Mr. Tietz: That is all.
>
> The Court: How long?
>
> Mr. Tietz: I beg your pardon.
>
> The Court: How long after you had registered was it that you went down to the local board to make that appearance?
>
> The Witness: I don't remember. It was shortly after I got this card, within a week or so."

It is submitted that this evidence cannot support a claim of timely request for a personal appearance or appeal and therefore, no claim of denial of due process can be made thereon.

VI.

SUMMARY.

Appellant's classification of I-A-O by the Local Board was a valid classification made within the provisions of the regulations.

The indictment brought against the appellant properly charged an offense against the United States.

The appellant was classified I-A-O at a legal meeting of the Local Board.

There was no denial of due process in the Classification of the Appellant.

No action of the Board was arbitrary or capricious.

There was no error of law in the rulings of the trial court and therefore, the conviction should be affirmed.

Respectfully submitted,

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